A **PNSB WATER SDN BHD v. MENTERI KEWANGAN MALAYSIA**

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[JUDICIAL REVIEW NO: WA-25-311-10-2020]
14 MARCH 2023

B

Abstract – *The law is trite; an order of certiorari is to quash a 'decision' or 'action' of a public body or authority while an order of mandamus is a command issued to a public body or authority to perform a public duty mandated by law which it had failed/omitted to do. An order of mandamus does not lie to perform a discretionary power and only lies where the applicant has a legal right to compel the performance of a duty provided in a statute.*

C

D ***REVENUE LAW:*** *Income tax – Assessments – Deduction of specific provision of doubtful debts disallowed – Applicant failed to fulfil requirements of s. 34(2)(b) of Income Tax Act 1967 – Application for judicial review – Whether there was decision subject to judicial review*

E ***ADMINISTRATIVE LAW:*** *Judicial review – Income tax – Deduction of specific provision of doubtful debts disallowed – Applicant failed to fulfil requirements of s. 34(2)(b) of Income Tax Act 1967 – Minister of Finance did not respond to applicant's request for directions for Director General of Inland Revenue to set aside assessments and tax exemption – Whether there was decision when Minister did not make any decision – Whether there was decision subject to judicial review –*

F *Whether application in nature of mandamus – Whether application abuse of court process*

Pursuant to a privatisation *cum* concession agreement between the State of Selangor and the applicant, and the construction *cum* agreement, the applicant was entitled to sell and supply treated water to Bekalan Air

G Selangor ('SYABAS'). Following an audit, the applicant was informed by the Director General of Inland Revenue ('DGIR') of its findings for the years of assessment ('YA') 2012 to 2018, that the deduction of specific provision of doubtful debts was disallowed on the ground that the applicant failed to fulfil the requirements of s. 34(2)(b) of the Income Tax Act 1967 ('Act'). The

H applicant replied that it was the DGIR's agreement that the specific provision for doubtful debts qualified for deduction under the said section on the following basis: (i) in accordance with the concession agreement, SYABAS continued supplying treated water regardless of the amount owing to the applicant; (ii) pursuant to the privatisation *cum* concession agreement, it was

I the applicant's obligation to continue supplying treated water to SYABAS regardless the amount owing from SYABAS; (iii) there was existence of the

deferred payment; and (iv) part of the debt could be recovered in a subsequent year of assessment, which was taxable under s. 30(1)(b) of the Act. The DGIR maintained his positions and proceeded to raise the assessments. When the Minister of Finance ('Minister') did not respond to the applicant's request for directions for the DGIR to set aside the assessments nor the tax exemption, the applicant filed the present application for judicial review. Objecting to the application, the respondent argued that: (i) the Minister did not make any decision which was subject to judicial review; (ii) the application was in the nature of *mandamus* for an order directing the Minister to exercise his powers under ss. 135 and 127(3A) of the Act; and (iii) the application was an abuse of court process.

Held (dismissing application):

(1) The Minister did not exercise his powers or make any decision under ss. 135 and/or 127(3A) of the Act as requested by the applicant. The applicant sought declarations that the assessments were unlawful, null and void. The proper contradictor to this declaration was the DGIR who made the decision. Yet, the applicant opposed the application of the DGIR to intervene as a party to this application. Apart from this, the proper body specifically conferred power to determine whether the assessments were correctly made was the Special Commissioners of Income Tax. Further, the declarations could not be made as the Minister did not make any decision and the ground of failing to give any reason did not arise and such a complaint was clearly frivolous and vexatious and an abuse of court process. No success could be envisaged on this ground for the declarations sought. (paras 17 & 18)

(2) The opening words of the principal order were 'an order for the respondent (Minister) to exercise his power'; the words were compelling words and directed to the Minister to exercise the power in the manner dictated by the applicant. The relief sought, as it was worded, was in pith and substance an order in the nature of *mandamus*. This could not, in law, be granted on the face of what had been pleaded by the applicant because the *mandamus* does not lie to perform a discretionary power and only lies where the applicant has a legal right to compel the performance of a duty provided in a statute. (paras 19-21)

(3) There could be no arguable case given that s. 135 of the Act does not envisage the Minister giving general directions to the DGIR to set aside the assessments and that s. 127(3A) of the Act does not envisage granting exemptions in respect of illegal and/or unlawful tax. Since there was no power to do what was requested of the Minister, there was no basis to seek the declarations sought against the Minister. There was no arguable case for further investigation at the substantive stage. (para 46)

Case(s) referred to:

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Council Of Civil Service Unions v. Minister For Civil Service [1984] 3 All ER 935; [1985] AC 374 ***(refd)***

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC ***(refd)***

Karpal Singh Ram Singh v. Ketua Hakim Negara [2011] 4 CLJ 179 HC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Perbadanan Kemajuan Ekonomi Negeri Johor [2009] 5 CLJ 518 CA ***(refd)***

Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 540 SC ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***

Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***

Mohd Karim Abas & Ors v. Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja [2013] CLJU 280; [2013] 1 LNS 280 CA ***(refd)***

Peguam Negara v. CMMT Investment Ltd (Civil Appeal No: W-01(IM)-575-10-2021) (Unreported) ***(refd)***

R v. Central Professional Committee For Opticians [1949] 2 All ER 519 ***(refd)***

Re Bukit Sembawang Rubber Co Ltd v. Sembawang Estates Ltd [1961] CLJU 102; [1961] 1 LNS 102 ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional [2018] 2 CLJ 762 CA ***(refd)***

Teng Chang Khim v. Badrul Hisham Abdullah & Anor [2017] 9 CLJ 630 FC ***(refd)***

Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan & Ors [2010] CLJU 1390; [2010] 1 LNS 1390 HC ***(refd)***

Winsome Al-Yatama Sdn Bhd & Anor v. Pentadbir Tanah Kota Tinggi [2015] 9 CLJ 110 HC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Zainal Hj Nasiruddin v. The Registrar Of Societies [2012] CLJU 939; [2012] 1 LNS 939 HC ***(refd)***

Legislation referred to:

Federal Constitution, art. 96

Income Tax Act 1967, ss. 30(1)(b), 34(2)(b), 99, 100, 101, 102, 127(3A), 135 Schedule 5, paras. 26, 34

Judges' Code of Ethics 2009, s. 13

Rules of Court 2012, O. 53

Other source(s) referred to:

MP Jain, *Administrative Law of Malaysia and Singapore,* 4th edn, p 615

For the applicant - S Saravana Kumar & Yap Wen Hui; M/s Rosli Dahlan Saravana Partnership
For the respondent - Liew Horng Bin; SFC

Reported by Najib Tamby

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] On 4 December 2023, I dismissed the application for leave to commence judicial review proceedings brought by the applicant, PNSB Water Sdn Bhd against the Minister of Finance ("the Minister") for the following reliefs (encl. 1):

(i) an order that the Minister exercise his powers under s. 135 and/or s. 127(3A) of the Income Tax Act 1967 ("ITA") to set aside or exempt the Director General of Inland Revenue's ("DGIR") assessment *vide* notices of assessment for the years of assessment ("YA") 2012, 2013, 2014, 2015, 2016 and 2017 and the assessment *vide* notice of additional assessment for YA 2018 on the ground that the assessments made were illegal, void, unlawful, in excess of authority, irrational, unreasonable and/or which resulted in a denial of the applicant's legitimate expectation ("the impugned assessments");

(ii) a declaration that the Minister is bound by s. 34(2)(b) of the ITA which provides that a debt which is reasonably estimated in all circumstances of the case to be irrecoverable is deductible; and

(iii) a declaration that the impugned assessments were unlawful as the DGIR did not deduct the debt estimated to be irrecoverable which is an allowed deductible under s. 34(2)(b) of the ITA.

[2] It is important to note that the impugned assessments were made by the DGIR. There are specific provisions in the ITA that expressly provide an aggrieved taxpayer an avenue of appeal against such assessments to the Special Commissioners of Income Tax ("Special Commissioners").

[3] In the instant case, instead of resorting to the statutorily appeal avenue against the impugned assessments made by the DGIR, the applicant approached the Minister by letter to do the following: (a) for a direction to be made under s. 135 of the ITA directing the DGIR to set aside the impugned assessments; and/or (b) to exempt the tax assessed by the DGIR under s. 127 of the ITA.

[4] My reason for dismissing the application for leave to commence judicial review proceedings was the failure of the applicant to satisfy the test for granting leave established by the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478.

A **The Background Facts**

[5] The facts pleaded by the applicant are as follows. Pursuant to a privatisation agreement *cum* concession agreement between the State of Selangor and the applicant dated 22 September 1994 and the construction *cum* operation agreement dated 22 March 1995, the applicant was entitled to
B sell and supply treated water to Syarikat Bekalan Air Selangor ("SYABAS").

[6] Following an audit, the applicant was informed by the DGIR *vide* letter dated 4 September 2020 of its audit findings for the YA 2012 to 2018 that the deduction of specific provision of doubtful debts was disallowed on
C the ground that the applicant failed to fulfil the requirements of s. 34(2)(b) of the ITA. In a letter dated 22 September 2020, the applicant through its tax agent informed that it was the DGIR's agreement that the specific provision for doubtful debts qualifies for deduction under the said section on the following basis:

D (i) in accordance with the concession agreement, SYABAS continues supplying treated water regardless of the amounts owing to the applicant;

(ii) pursuant to the privatisation agreement *cum* concession, it was the applicant's obligation to continue supplying treated water to SYABAS
E regardless of the amount owing from SYABAS;

(iii) there is no existence of the deferred payment in the present matter;

(iv) part of the debt can be recovered in a subsequent year of assessment, which is taxable under s. 30(1)(b) of the ITA.

F **[7]** The DGIR responded in a letter dated 30 September 2020, maintaining his position and proceeded on the same day to raise the impugned assessments.

[8] In a letter dated 9 October 2020, the applicant wrote to the Minister
G requesting directions be given to the DGIR to set aside the impugned assessments on the basis that the DGIR's assessment was contrary to s. 34(2) of the ITA and/or to exempt the tax arbitrarily imposed under s. 127(3A) of the ITA. An ultimatum was given to the Minister to accede with the request by 15 October 2020.

H **[9]** When the Minister did not issue any direction nor exempt the tax as requested, the applicant, on 19 October 2020, filed the instant application for leave to commence judicial review proceedings for the reliefs stated in para. [1] above.

The Grounds For Review

I **[10]** The grounds of review stated in the O. 53 statement are as follows:

(i) the Minister in making his decision failed to consider that the impugned assessments made by the DGIR are illegal, void, unlawful, and/or in excess of authority on the following grounds:

(a) that the applicant's specific provision of doubtful debt falls within the ambit of s. 34(2)(b) of the ITA;

(b) that there was no justification by the DGIR for not treating the debt as a bad debt and giving effect to s. 34(2)(b) of the ITA;

(c) the requirements of s. 34(2) have been fulfilled by the applicant; and

(d) the DGIR disregarded basic principles of construction of taxing legislation decided by the superior courts.

(ii) the decision of the Minister in not giving the directive and/or exempting the tax is irrational on the following grounds:

(a) that the decision is so unreasonable that no reasonable person could have come to that decision based on the explanation contained in the applicant's letter dated 9 October 2020.

(b) this is especially so when the Minister had failed to give any valid justification, reason or basis for its decision.

(c) the Minister failed to consider that the applicant at all material times acted in good faith, gave full co-operation, made full and frank disclosure, and obtained professional advice in managing its finances and tax affairs.

(d) the Minister failed to take cognisance of superior court decisions of the construction of taxing statutes.

(e) the Minister failed to appreciate and to give effect to the true effect and application of the ITA amounts to a clear contravention of art. 96 of the Federal Constitution.

(iii) the Minister's decision was made without having any regard to the legitimate expectation of the applicant as the Minister failed to consider the decisions of the superior courts in relation to the interpretation and construction of legislation and which disregard constitutes a denial of the legitimate expectation of the applicant.

[11] It is to be observed that the grounds of review refer to a decision but in actual fact the Minister did not make any decision at all.

The Test To Be Applied At The Leave Stage

[12] This brings me to the duty of the judge hearing an application for leave. To obtain leave of court to commence judicial review proceedings, the established test is aptly described by the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 in the following words:

A Without the need to go into the depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though *ie*, unless the matter for judicial review is amenable to judicial review
B absolutely no success may be envisaged.

[13] The test in *WRP Asia Pacific Sdn Bhd* envisages three categories where leave of court will be refused. The first is where the application is found to be 'frivolous and vexatious'. In *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; [2006] 5 MLJ 60 and *Teh*
C *Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional* [2018] 2 CLJ 762; [2015] 3 AMR 35, the Court of Appeal set out the established frivolous and vexatious situations, namely, where the application:

(i) is made by a busybody;

D (ii) is misguided or misconceived or are trivial complaints of administrative errors;

(iii) is made outside the prescribed time;

(iv) is made against a person or body that is immunised from being
E impleaded in legal proceedings; and

(v) where there is an alternative remedy or more appropriate remedy.

[14] The second arises when the application is not found to be frivolous and vexatious, leave will be nevertheless be refused where an arguable case
F for further investigation at the substantive stage is not made out. The threshold for this situation is very low. All that is required at this stage is for the judge to peruse the material placed by the applicant before the court, it being an *ex parte* application, to see whether "an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome". Leave of court will be granted in all cases unless "absolutely no
G success may be envisaged". Where "absolutely no success may be envisaged" is very rare.

[15] The third is where the matter for review is not amenable to judicial review. In this situation include matters that are non-justiciable, policy considerations, and management prerogative. (See *Dr Michael Jeyakumar*
H *Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009; *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2010] CLJU 1390; [2010] 1 LNS 1390; [2011] 1 MLJ 128; and *Teng Chang Khim v. Badrul Hisham Abdullah & Anor* [2017] 9 CLJ 630).

I

Applying The Test

[16] The Attorney General raised the following matters as to why leave ought not to be granted: (i) the Minister did not make any decision which is subject to judicial review; (ii) the main application is in the nature of *mandamus* for an order directing the Minister to exercise his powers under ss. 135 and 127(3A) of the ITA; and (iii) the application is an abuse of the process of the court.

[17] To reiterate the obvious fact, the Minister in the instant case did not exercise his powers or make any decision under ss. 135 and/or 127(3A) of the ITA as requested by the applicant. In the said letter, dated 9 October 2020, to the Minister (referred to as YB Senator), the applicant gave its reasons why the decision of the DGIR was wrong and concluded as follows:

> 9. As the DGIR has misapplied the law we humbly **request the MOF to direct the DGIR to review their exercise of power and functions so that the law is applied correctly and fairly.**
>
> 10. Further, as the DGIR has arbitrarily issued additional assessments for the YAs 2012 to 2018 on 30.9.2020, we also seek the YB Senator to exempt the same from income tax by virtue of Section 127(3A) of the Act of SGSB.
>
> 11. As the DGIR has issued the assessments, we require the YB Senator to give the necessary directions to the DGIR and/or issue the tax exemption urgently or by 15.10.2020. If we do not receive a reply from your good office within a week from the receipt of this letter we will assume that the YB Senator is not considering our request for a direction and/or tax exemption, and we reserve all our legal rights accordingly.
>
> (emphasis added)

[18] Secondly, the applicant sought declarations seeking to declare the impugned assessments unlawful, null, and void. The crucial fact is that the Minister did not make the impugned assessments. The proper contradictor to this declaration is the DGIR who made the decision. Yet, the applicant opposed the application of the DGIR to intervene as a party to this application. Apart from this, the proper body specifically conferred power to determine whether the impugned assessments were correctly made are the Special Commissioners. Further, the declarations cannot be made as the Minister did not make any decision and the ground of failing to give any reason does not arise and such a complaint is clearly "frivolous and vexatious" and an abuse of the process of the court. No success can be envisaged on this ground for the declarations sought.

Relief Seeking An Order That The Minister Exercises Power

[19] I will now address the first issue that the principal order was in the nature of *mandamus* and the ingredients of this order are not established on the facts, which if were to be assumed to be true, would not in law entitle

the applicant to relief. The opening words of the principal order are: "an order for the respondent (Minister) to exercise his power". The powers referred to are housed in ss. 135 and 127(3A) of the ITA. The words are compelling words and directed to the Minister to exercise the power in the manner dictated by the applicant. The relief sought, as it is worded, is in pith and substance an order in the nature of *mandamus*. It is certainly not the words for obtaining an order for *certiorari*. This was recognised by the applicant, as it was subsequently submitted in the applicant's written submission in reply.

[20] It is trite that an order of *certiorari* is to quash the legal effect of a decision and this is not made out by the words employed in the principal relief sought. What is prayed for is to exercise power. I have considered the submissions and agree with the Federal Counsel who appeared for the Attorney General that what is sought is an order in the nature of *mandamus* which cannot in law be granted on the face of what had been pleaded by the applicant. As such, there is no arguable case for the principal order sought to be investigated at the substantive stage.

[21] The reason the order cannot be granted in law is because the *mandamus* does not lie to perform a discretionary power and only lies where the applicant has a legal right to compel the performance of a duty provided in a statute. The use of the word 'may' in both the sections relied on by the applicant confers discretionary power and not a duty on the Minister. For ease of reference, the sections are reproduced below. Section 135 of the ITA states:

> The Minister **may** give to the Director General directions of a general character (not inconsistent with this Act) as to the exercise of the functions of the Director General under this Act, and the Director General shall give effect to any directions so given.
>
> (emphasis added)

while s. 127(3A) of the ITA states:

> The Minister **may**, in any particular case exempt any person from all or any of the provisions of this Act, either generally or in respect of any income of a particular kind or any class of income of a particular kind.
>
> (emphasis added)

[22] There is a plethora of authorities on the point and it is sufficient to cite the following instructive extract from MP Jain, *Administrative Law of Malaysia and Singapore*, 4th edn, at 615 (see Court of Appeal decisions of *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123 and *Mohd Karim Abas & Ors v. Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja* [2013] CLJU 280; [2013] 1 LNS 280 where the same extract from an earlier edition of the book was applied):

> *Mandamus* is thus a very wide remedy which is available against a public officer to see that a duty is performed or carried out, in accordance with law. Enforceable by *mandamus* is a duty of a public nature, the performance of which is imperative and not optional or discretionary. **Thus, if an officer has power, rather than a duty, and does not use such power, *mandamus* is not issued if the officer refuses to exercise the power for the wrong reasons.** (emphasis added)

[23] The decision in *Karpal Singh Ram Singh v. Ketua Hakim Negara* [2011] 4 CLJ 179 is relevant. There, an order of *mandamus* was sought directing the Chief Justice to respond to the applicant's request under s. 13 of the Judges' Code of Ethics 2009 to act in the manner dictated by the applicant. It was held that there must be under the law some duty cast upon the public officer before an order of *mandamus* can be made. If the public officer does not carry out his duty, the court will call upon him to perform that duty by an order of *mandamus*. The court found that s. 13, from the language used, did not impose a duty on the Chief Justice to act in a manner dictated by the applicant. The principle was lucidly stated as follows:

> What can be enforced through *mandamus* is a duty of a public nature, the performance of which is imperative and not optional or discretionary with the concerned authority. Thus, if an officer has power, rather than a duty, and if he does not use his power, a *mandamus* is not issued to compel him to exercise his power.

Whether There Is An Arguable Case For An Order Of Certiorari

[24] As stated above, the applicant subsequently, in its supplementary written submission dated 29 September 2023, submitted that the order sought against the Minister was an order of *certiorari* and not an order of *mandamus*. This submission cannot be correct as shown above. The applicant was seeking the relief as it is framed because the Minister did not respond to the applicant's letter dated 13 December 2021, requesting him to exercise his powers under s. 135 of the ITA and/or s. 127(3A) of the ITA. I had explained above why the relief as prayed by the applicant cannot be granted. The law is trite. An order of *certiorari* is to quash a 'decision' or 'action' of a public body or authority while an order of *mandamus* is a command issued to a public body or authority to perform a public duty mandated by law which it had failed or omitted to do.

[25] Notwithstanding, that *certiorari* was not prayed as a relief, I proceeded to consider the cause papers to determine whether *certiorari* could be sought on the grounds of review and facts that were pleaded by the applicant. The applicant had articulated the point in its abovementioned supplementary written submission, submitting that the Minister's silence can amount to a decision amenable to judicial review. The Federal Court decision in *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan*

Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805; [2011] 6 MLJ 490 adopted the principle in *Council Of Civil Service Unions v. Minister For The Civil Service* [1985] AC 374; [1984] 3 All ER 935 and said as follows:

> [26] It is trite law that the purpose of an order for *certiorari* is to quash the legal effect of a decision. In England, in the case of *Council of Civil Service Unions v. Minister for Civil Service* [1984] 3 All ER 935 the House of Lords held that **for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a decision,** and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy.
>
> [27] We adopt the same view. ... (emphasis added)

[26] Based on the decision in *Members Of The Commission Of Enquiry*, the applicant now submits that a decision amenable to *certiorari* can include a purported non-decision such as that in the present matter, so long as the decision affects the aggrieved party either by altering his rights or obligations or by depriving him of the benefits which he has been permitted to enjoy. It was further submitted that in the instant case, the applicant has expressly stated in its letter dated 9 October 2020 that the failure by the Minister to respond to the letter, will be treated as a rejection by the Minister and the applicant shall proceed to commence the necessary legal proceedings on this premise.

[27] So, now the applicant is relying on the second type of decision stated in *Council Of Civil Service Unions v. Minister For Civil Service* [1984] 3 All ER 935 *ie*, that a "refusal to make a decision" is also a decision. This is clear as in *Council Of Civil Service Unions* the decisions susceptible to an order of *certiorari* are one of two types: type one is where the decision-maker has made a decision and type two is where there is a decision refusing to make a decision. It is also clear that a refusal to make a decision is different from a decision rejecting the requests that were made under ss. 135 and/or 127(3A) of the ITA.

[28] The Minister did not make a decision refusing to make a decision on the said requests. It follows that there is no decision of the second type that is susceptible to *certiorari*. In coming to this conclusion, I had to first decide whether I could consider the relief of *certiorari* when the relief was not expressly pleaded and then decide whether there was a 'refusal to make a decision' that was susceptible to the remedy of *certiorari*.

[29] In deciding the first question, I kept in mind the established principle that a judge hearing an application for leave under O. 53 of the Rules of Court 2012 has to adopt a flexible approach when determining technical objections (see *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006]

1 CLJ 927 and *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor* [2014] 2 CLJ 525). Adopting this approach, I found that grounds had been pleaded in the O. 53 statement (see para. 3) seeking to quash a purported decision of the Minister on illegality and irrationality, indicating that the relief of *certiorari* was in contemplation notwithstanding that the relief was not expressly stated or prayed for. A B

[30] The grounds of review have already been alluded to above. Since there are grounds raised for the remedy of *certiorari*, I am of the view that the applicant is entitled to contend that it has put forward a case for the relief of *certiorari*. Thus, if the applicants are able to establish an arguable case, this court is then in a position to make an order that necessary amendments be made to the cause papers to reflect the correct relief sought. C

[31] Now, the grounds stated in the O. 53 statement alleged that the Minister had deemed or purported to have made a decision (as opposed to a refusal to make a decision) on the request of the applicant. It is alleged that the purported decision is riddled with errors and that which decision is liable to be quashed on the grounds of illegality and irrationality. Herein, the fatal flaw in the applicant's case is exposed. D

[32] The incontrovertible fact shows that the Minister did not make any decision and did not reply to the applicant's letter. There is therefore no nexus between the grounds raised in the O. 53 statement and the relief of *certiorari*, given the fact that the Minister as decision-maker did not make a decision. It was an omission to reply to the letter where the requests were made. The grounds the applicant raised in the O. 53 statement seek to quash a fictitious decision or action of refusing to make a decision. As such, no arguable case for investigation at the substantive stage is made out and the application is one which is in essence frivolous and vexatious. E F

[33] The second question was whether there was a decision by the Minister refusing to make a decision (as opposed to making a decision). The decision by a decision-maker refusing to make a decision is susceptible to an order of *certiorari* (decision in the second sense enunciated in *Council Of Civil Service Unions*). In the instant case, the Minister did not reply to the applicant's letter where it was sought for the Minister to exercise his powers under ss. 135 or 127(3A) of the ITA in the manner dictated by the applicant. G

[34] The principles in respect of a 'refusal to make a decision' were established in *Re Bukit Sembawang Rubber Co Ltd v. Sembawang Estates Ltd* [1961] CLJU 102; [1961] 1 LNS 102; [1961] 1 MLJ 269 and followed in *Winsome Al-Yatama Sdn Bhd & Anor v. Pentadbir Tanah Kota Tinggi* [2015] 9 CLJ 110. The principles can be summarised as follows: H

(i) a refusal to make a decision may be an absolute refusal in terms or there may be conduct amounting to a refusal. Where the respondent has not refused compliance in express terms it is a question of fact whether his conduct evinces a clear determination not to comply. I

A (ii) there must be clear evidence of a refusal to act. This can be established primarily on the basis of an inordinately long delay as to amount to a refusal to consider and determine the application made to the decision-maker (*R v. Central Professional Committee For Opticians* [1949] 2 All ER 519).

B **[35]** In my judgment, based on the facts alluded to by the applicants, there was no inordinate delay as the letter seeking directions and tax exemption was dated 9 October 2020. The application for leave was filed on 19 October 2020. This timeframe does not evince an inordinate delay. The Minister was being asked to review what the DGIR had done and to issue directions and C exempt taxes.

[36] For completeness, even if there is a decision that qualifies as a 'refusal to make a decision' that is susceptible to *certiorari,* what can be quashed, if at all, is merely the decision of refusing to make a decision. The case of *Zainal Hj Nasiruddin v. The Registrar Of Societies* [2012] CLJU 939; [2012] D 1 LNS 939; [2012] MLJU 1623 is instructive. There, the applicant made an application to the Registrar of Societies ("Registrar") to register a political party. The Registrar did not make any decision either to refuse or to allow the application. It was held that an inordinate delay, without good reason, to make a decision amounted to a 'refusal to make a decision'. Ravinthran E J (as His Lordship then was) held that such inordinate delay was unlawful and *ultra vires* the Societies Act 1966 but to compel the Registrar to register the political party would be putting the cart before the horse as the Registrar has not made any decision as yet. An order of *mandamus* to compel the Registrar to make a decision whether to register the political party or not to F register the political party within 21 days of the order was made by His Lordship.

[37] Thus, an application to quash a decision by a decision-maker not to make a decision must be accompanied by an order of *mandamus* to compel the decision-maker to make a decision on the matter as mandated by G Parliament. The court cannot usurp this power. In the instant case, the power is conferred on the Minister. Without the accompanying order of *mandamus*, the applicant is only left with 'no decision made by the decision-maker'.

[38] Similarly, in the instant case, if the decision not to make a decision *ie*, decision not to exercise powers under ss. 135 and/or 127(3A) of the ITA, H is quashed, an order of *mandamus* to compel the Minister to exercise his powers must follow. However, as shown above, no order of *mandamus* can be made as ss. 135 and 127(3A) of the ITA confers discretionary power and not a duty on the Minister.

I

The Non-applicability Of Sections 135 And 127(3A) Of The ITA

[39] This is an additional ground to refuse leave on the premise that the application is frivolous and vexatious. Again, it is important to keep in mind the following crucial facts: (i) that the Minister did not make a decision in respect of the applicants' requests; and (ii) that the assessments made by the DGIR are alleged to be illegal and/or unlawful *ie*, the tax illegally levied in law. The applicants came to the Minister to set aside the assessments made by the DGIR by way of directions to be given to the DGIR to set aside the same or the Minister himself exempt the tax as assessed by the DGIR.

[40] In my view, the Minister has no power to do what the applicant is requesting him to do under ss. 135 and/or 127(3A) of the ITA. As such, there is no arguable case for investigation at the substantive stage for the reliefs prayed or not prayed for *ie*, *mandamus*, *certiorari*, and declaration on the material presented to this court. My reasons are as follows.

[41] The ITA is structurally designed and is divided into parts and chapters to take care of specific areas. The power to set aside any wrongful assessments in law lies with the Special Commissioners by way of an appeal under s. 99 of the ITA or, in certain instances, by the High Court by way of judicial review if special circumstances are shown. Sections 99 to 102 are in Chapter 2 under Part VI of the ITA which specifically provides for 'Assessments and Appeals'. An appeal envisaged in the sections is specifically and expressly directed against assessments made by the DGIR. The Special Commissioners are conferred with express power under para. 26 of Schedule 5 of the ITA to discharge or set aside or amend any assessments made by the DGIR. An appeal against the decision of the Special Commissioners lies to the High Court (s. 102 read with para. 34 of Schedule 5 of the ITA).

[42] Section 135 of the ITA is housed in Chapter 1 under Part X which solely concerns 'Administration'. The purpose of the provision is for the Minister, when he is of the view it is required, to give directions of a general character as to the exercise of the functions of the DGIR, not inconsistent with provisions of the ITA, to the DGIR. The directions are administrative and general in nature and certainly not directions specific in nature such as giving directions to the DGIR to set aside assessments he had made in a particular case. Setting aside an assessment is not a matter concerning 'administration' falling within the purview of s. 135 of the ITA. The power to set aside an assessment is provided only by way of an appeal to the Special Commissioners and not to the Minister.

[43] Section 127(3A) of the ITA specifically confers power on the Minister to grant tax exemptions. The section is in Part IX of the ITA which concerns 'Exemptions, Remission, and Other Relief'. Section 127(3A) of the ITA is an empowering provision conferring power on the Minister to exempt a person from 'any provision' of the ITA or exempt 'any income of a particular

kind or any class of income of a particular kind'. The section envisages that the person requesting exemption is lawfully liable to pay tax. But, in the instant case, what was sought to be exempted was a tax that should not have been levied since it is the applicant's pleaded case was that the tax was illegally, arbitrarily, and/or wrongfully assessed in law.

[44] It is the basic law that 'income tax is a tax on income' and 'exemption only becomes relevant when there is chargeable income, but not otherwise'. This principle was reiterated in *Ketua Pengarah Hasil Dalam Negeri v. Perbadanan Kemajuan Ekonomi Negeri Johor* [2009] 5 CLJ 518 by the Court of Appeal referring to, amongst others, *Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 540 where it was held that a tax exemption is only given after liability to tax has been determined in the following words:

> In other words, there must be a liability to income tax first, and then only the question of claiming exemption ... arises.

[45] In the instant case, the applicant is claiming to be exempted, not from lawfully determined tax but from illegally and/or unlawfully levied tax. That is not the purpose of s. 127(3A) of the ITA. Section 127(3A) of the ITA is to exempt tax lawfully levied tax. It is axiomatic that only lawful levied tax can be exempted. Therefore, the exemption sought in the instant case is something that the Minister clearly has no power of doing. To set aside the unlawfully levied tax by the DGIR, the applicant must approach the SCIT by way of an appeal or if allowed, by the High Court by way of judicial review.

[46] For the above reasons, there can be no arguable case given that s. 135 of the ITA does not envisage the Minister giving general directions to the DGIR to set aside the assessments and that s. 127(3A) of the ITA does not envisage granting exemptions in respect of illegal and/or unlawful tax. Since there is no power to do what is requested of the Minister, there is no basis to seek the declarations sought against the Minister. There is no arguable case for further investigation at the substantive stage.

Conclusion

[47] It was submitted that exactly the same applications as the instant application for leave had been allowed by the High Court and in one of those cases *ie*, *Peguam Negara v. CMMT Investment Ltd* (Civil Appeal No: W-01(IM)-575-10-2021) the decision of the High Court was upheld by the Court of Appeal.

[48] It suffices to say that the said cases and *CMMT Investment Ltd* are distinguishable on the admitted fact that the specific issues that arose for consideration in this case were not the subject matter of any of those cases.

[49] For the foregoing reasons, the application for leave was dismissed.